No. 79-24

In the Supreme Court of the United States

OCTOBER TERM, 1978

SALVADORE GUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals did not write an opinion (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1979. The petition for a writ of certiorari was filed on July 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether out-of-court statements by one of petitioner's co-conspirators were properly admitted into evidence.

2. Whether petitioner was entitled to a new trial on the basis of his allegations that the government concealed exculpatory evidence.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of six years' imprisonment on each count followed by a three-year special parole term. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that on September 7, 1976, Andrew Abbott, a Chicago police officer working in an undercover capacity with the Drug Enforcement Administration, met with Jack Quiroga and arranged to buy two ounces of heroin (Tr. 23-29, 114-115, 145-146).[1] Later in the evening, after conducting a field test on a sample of heroin he received from Quiroga, Agent Abbott went with Quiroga to pick up the two ounces of heroin he had agreed to purchase (Tr. 30-37, 115-117, 147). On the way, Quiroga informed Abbott that his supplier could provide Abbott with as much heroin as he needed (Tr. 36-37). Quiroga then left Abbott in the car and walked to an alleyway on the south side of petitioner's residence at 2704 South Wallace (Tr. 36-37, 113). A half hour later, Quiroga emerged from the alley, returned to the car, and gave Abbott two bags containing heroin. Abbott in turn paid Quiroga $1,650 (Tr. 38-39, 148; Govt. Exh. 2).

[1]Quiroga pled guilty to possession with intent to distribute and conspiracy.

On September 9, 1976, Agent Abbott received a telephone call from Quiroga, and the two men arranged a four-ounce heroin sale. Again, Quiroga told Abbott that his supplier could provide sufficient heroin to satisfy Abbott's needs. Abbott and Quiroga agreed to meet later in the day. Shortly before the meeting, Quiroga was seen entering the alley that led to the apartment building in which petitioner lived (Tr. 118). When Quiroga met Agent Abbott 30 minutes later, they again discussed the four-ounce heroin transaction and Abbott gave Quiroga $3,300. Quiroga counted the money and returned it to Abbott. He told Abbott he would return shortly in a 1967 gray Ford, and they would exchange the money and heroin through the car window. Quiroga then left Abbott and walked to a 1967 gray Ford parked nearby. The car was registered to petitioner. Quiroga drove the car back to the alley near petitioner's building (Tr. 40-43, 113, 118-119, 149). Five minutes later, Quiroga left the building and drove the Ford to the place where Agent Abbott was waiting. Quiroga handed Abbott a box containing four bags of heroin (Tr. 44, 118-119; Govt. Exh. 3), and Abbott gave Quiroga the $3,300. Quiroga then returned to 2704 South Wallace, and soon thereafter he and petitioner left the building and drove away in the Ford (Tr. 119, 149-151).

On September 14, 1976, during a telephone conversation with Agent Abbott, Quiroga stated that petitioner was his supplier (Tr. 45). The two men agreed to meet that evening, at which time they discussed Abbott's possible purchase of two kilograms of heroin. Quiroga insisted on seeing his supplier and told Abbott to drive him to 1610 South Loomis, a former residence of petitioner's (Tr. 113). When they arrived, petitioner came out of the building and talked with Quiroga at the car.

Quiroga told petitioner that he wanted to speak with him about something important and would return in five minutes. Petitioner reentered the building, and Quiroga, after driving around for a few minutes with Abbott, asked the agent to take him back to 16th and Loomis (Tr. 45-49, 113, 120-121). Abbott did so and Quiroga entered the building at 1610 South Loomis (Tr. 121).

In two taped telephone conversations on November 22, 1976, Quiroga and Agent Abbott made arrangements for another heroin transaction. That afternoon petitioner, Quiroga, and a third man were seen standing at the corner of 18th and Ashland. Petitioner and the third man went into the building at 1804 South Ashland (Tr. 123, 132-133, 153), and shortly thereafter Abbott arrived and met Quiroga (Tr. 56, 123, 134). Quiroga told Abbott that the heroin and his supplier were in the building at 1804 South Ashland. Quiroga entered the building and returned about five minutes later with two ounces of heroin, for which Abbott paid $1,650 (Tr. 134-135, 154). Quiroga then returned to 1804 South Ashland and was later seen leaving with petitioner and the third man (Tr. 56-59, 113, 136-137, 155-156).

On November 23, 1976, Quiroga called Agent Abbott and offered to sell him nine ounces of heroin at $825 an ounce. The men agreed to meet at 18th and Ashland. Quiroga arrived in a car driven by petitioner. Petitioner and a third man remained in the car and parked nearby. Quiroga met Abbott on the corner and told him that the heroin was in a garage behind 1804 South Ashland. Quiroga left Abbott, and when he returned he gave Abbott nine ounces of heroin. Quiroga and petitioner were then arrested (Tr. 60-64, 138-140, 150, 157-159).

ARGUMENT

1. Petitioner contends (Pet. 23-36) that the government presented insufficient independent evidence of his involvement in the conspiracy to justify the admission of the out-of-court statements of the co-conspirator Quiroga. This argument is without merit.

The government introduced adequate independent evidence tending to show the existence of a conspiracy and petitioner's participation therein.[2] On September 7 and 9, the heroin transactions could not be completed until Quiroga went to petitioner's residence. On the latter occasion, Quiroga used petitioner's car in the course of his dealings with Agent Abbott. He then returned to petitioner's residence and was seen leaving with petitioner immediately after the sale was completed. During negotiations for another drug deal on September 14, Agent Abbott and Quiroga again went to petitioner's residence, although no transaction occurred that day. On November 22 and 23, petitioner arrived with Quiroga shortly before the drug sales, and he remained in the area while the transactions were completed.

Petitioner correctly observes (Pet. 35-36) that the courts of appeals have adopted somewhat different formulations to describe the quantum of independent evidence of a defendant's participation in a conspiracy that must be introduced in order to justify the admission of out-of-court co-conspirator statements. The cases are collected in the government's brief in opposition in *Macklin* v. *United States*, cert. denied, No. 77-6895 (Oct. 2, 1978).[3] See also *United States* v. *James*, 590 F. 2d 575 (5th Cir.) (en banc),

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[2]A defendant's participation in a conspiracy may be established by circumstantial evidence. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

[3]A copy of this brief has been sent to petitioner.

cert. denied, Nos. 78-1412, 78-6369, and 78-6431 (June 4, 1979). But, as we have frequently stated in our oppositions to certiorari petitions in this Court, it seems likely that, whatever the proper standard for determining the admissibility of co-conspirator statements, variation in its phrasing will seldom, if ever, produce different results. Here, for example, the independent proof was sufficeint to satisfy the "prima facie" test advocated by petitioner (see, *e.g.*, *United States* v. *McManus*, 560 F. 2d 747 (6th Cir. 1977); *United States* v. *King*, 552 F. 2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977)), the "preponderance of the evidence" standard (see, *e.g.*, *United States* v. *Mangan*, 575 F. 2d 32 (2d Cir. 1978); *United States* v. *Petrozziello*, 548 F. 2d 20 (1st Cir. 1977)), and the "substantial independent evidence" test attributed by petitioner to *United States* v. *Dixon*, 562 F. 2d 1138 (9th Cir. 1977). Accordingly, resolution of the verbal inconsistencies in the circuits' formulation of the proper standard would not aid petitioner. The evidence presented was sufficient under any test, and this case therefore is not an appropriate vehicle for the Court's review of the question.

2. Petitioner also argues (Pet. 37-42) that the district court erred in denying his motion for a new trial on the basis of the government's alleged suppression of evidence of another drug deal between Agent Abbott and Quiroga at which petitioner was not present. In light of the character of the "newly discovered evidence," the district court did not abuse its discretion in refusing to grant a new trial.

At an evidentiary hearing held on petitioner's motion, Quiroga denied ever having named petitioner as his heroin source and further stated that his suppliers were two illegal aliens, Chango and Jose, whose last names and addresses he did not know. Quiroga also testified that he

and Agent Abbott had engaged in another attempted heroin transaction in Villa Park, at which petitioner was not present. Agent Abbott did not describe this incident in his testimony at petitioner's trial. At the hearing on the new trial motion, government agents confirmed Quiroga's account of the attempted drug deal at Villa Park; they explained, however, that because the transaction was not completed, it yielded no information useful to their investigation and therefore was not reported (Supp. Tr. 8-10, 15-16, 26-31, 60, 64, 66, 70-77, 81-83).[4]

The testimony at the hearing showed that the "newly discovered evidence" existed before trial and could have been discovered with due diligence. Petitioner knew Quiroga's role in the case, yet he made no effort to call Quiroga as a witness.[5]

Moreover, had it been introduced at petitioner's trial, the "new" evidence would not probably have produced an acquittal. Even if petitioner was not present at the Villa Park meeting, his absence on that occasion does not negate his involvement in the drug transactions charged in the indictment, nor does it contradict any testimony that

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[4]"Supp. Tr." refers to the transcript of the hearing on petitioner's motion for a new trial.

[5]Petitioner's assertion that the government prevented Quiroga from testifying is erroneous. Quiroga pled guilty on November 11, 1977, at which time the district court ordered a pre-sentence investigation report and set December 15, 1977, for sentencing. Petitioner's trial began on November 14, 1977, and concluded four days later. Petitioner did not request a continuance so that Quiroga could testify after he was sentenced. The government did not suggest or recommend Quiroga's sentencing date, which the district court set at a normal and reasonable time after the guilty plea.

Agent Abbott gave.[6] At most, the evidence would have been marginally relevant to negate any impression the jury may otherwise have had that petitioner was present every time Quiroga and Abbott met for a heroin transaction. In light of the marginal materiality of this evidence, it afforded no basis for a new trial.

In sum, Quiroga's proffered testimony did not satisfy the standards governing the grant of a new trial based on newly discovered evidence (see, *e.g.*, *United States* v. *Wynde*, 579 F. 2d 1088, 1097 (8th Cir. 1978); *United States* v. *Ellison*, 557 F. 2d 128, 133 n.2 (7th Cir.), cert. denied, 434 U.S. 965 (1977)), and the district court did not err in denying petitioner's motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

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[6]Where the information obtained by law enforcement officers is not exculpatory, the government is not obliged to make a complete and detailed accounting to the defense of all police investigatory work. *Moore* v. *Illinois*, 408 U.S. 786, 795 (1972).